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No. 98-1785

IN THE
Supreme Court of the United States

J.S.G. BOGGS,
Petitioner,

v.

LAWRENCE H. SUMMERS, BRIAN L. STAFFORD, and JANET RENO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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1. Prior Restraint.—The Petition demonstrates that the self-help confiscation of Boggs' art without *any* procedural safeguards was a gross departure from established First Amendment requirements. The Petition also demonstrates that the lower courts approved this departure on the ground that erotic expressive material charged with obscenity is entitled to more First Amendment protection than other speech.

Respondents do not and cannot deny that Boggs' art is entitled to protection under the First Amendment. They do not and cannot deny that they did not provide anything resembling the process this Court mandated in *Freedman v. Maryland*, 380 U.S. 51 (1965), and its progeny. And they do not and cannot deny that the

Freedman safeguards apply to a wide variety of speech—not just erotic expression.

Respondents also ignore the views of *amici*—who confirm that Boggs is a well-regarded artist whose work merits serious consideration, drawing attention to issues concerning the interplay between art and money and the many ways in which they coexist.[1]

a. Respondents' "Remedy" Argument.—Respondents' principal argument in opposition to the Petition is not to deny the importance of the issue or even to defend the lower courts on the merits but to make an oblique suggestion that this Court may not be in a position to effect the relief Petitioner seeks: the return of his art as a remedy for the First Amendment violations he has suffered. Respondents' argue that the First Amendment violation must go without a remedy because "contraband *per se*" may never be returned. Opp. 10-14.[2]

In the first place, Respondents' position begs the question because it assumes that Boggs' art was "contraband *per se*," although that was an issue on which the government had the burden of proof. An item is not "contraband *per se*" until the government proves that the item

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1 Respondents' case seems to turn in large part on a wooden translation from the French of the phrase "*trompe l'oeil.*" The fact of the matter is that *trompe l'oeil* works of art do not fool the *brain*, they fool the *eye*—for an instant; they tease the viewer, as does Boggs' art. If they did actually deceive, they would not be works of art. Because Respondents insist on distorting the nature of Boggs' work—which is not in the record because of the extraordinary departures in the courts below from normal judicial procedures—Petitioner respectfully invites the Court to evaluate the two representative samples of Boggs' work attached hereto (App. 1a to 4a).

2 Respondents also claim that even if the art was not contraband and was improperly seized, they could not be made by the courts to give it back (Opp. 10-11 n.5), a position for which they cite no authority. *See infra* pp. 3-5 & n.4, p. 10.

fits a valid statutory prohibition.[3] In this case, the only "proof" has come in an *ex parte* hearing of which no transcript was taken and in which neither the alleged "contraband" nor copies of it nor any description of it ever made it into the record.

Even on its own terms (that is, assuming that Boggs' art or portions of it were contraband) Respondents' suggestion is wrong for two reasons. *First*, this and other courts have held repeatedly that the remedy for the improper seizure and retention of property presumptively protected by the First Amendment, invalid for absence of an adversary hearing, is the return of the material. Even the District Court, which ruled against Boggs, recognized that "Boggs accurately notes that the proper remedy for the unconstitutional seizure and retention of [expressive] property is the return of the material." Pet. App. 30a. The District Court's statement was indisputably correct.

In *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 206-08 (1964), the books at issue had been seized without a prior adversary hearing. Less than two months after the seizure, a state trial court held a hearing and adjudged the books to be obscene. *See State v. A Quantity of Copies of Books*, 379 P.2d 254, 255 (Kan. 1963), *rev'd* 378 U.S. 205 (1964). That determination, as well as the order to destroy the books, was affirmed by the state appellate courts. *Id.* at 257. This Court accepted the state courts' post-seizure determination that the books at issue were obscene—and thus contraband *per se*—but

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[3] *See, e.g., United States v. 37.29 Pounds of Semi-Precious Stones*, 7 F.3d 480, 485 (6th Cir. 1993) ("[u]ntil the United States proves [the elements of the statute rendering the stones contraband including] illegal importation, the gemstones are not the property of the United States"); *Cooper v. City of Greenwood*, 904 F.2d 302, 305-06 (5th Cir. 1990).

held that the post-seizure hearing did not cure the First Amendment violations that had occurred, and reversed the order authorizing their destruction. 378 U.S. at 208, 212-13.

Indeed, this Court has expressly and repeatedly rejected the claim that the status of particular expressive materials as "contraband" constitutes a defense for failure to follow constitutionally required procedure in their seizure. *See A Quantity of Copies of Books*, 378 U.S. at 211-12 ("it is no answer to say that obscene books are contraband"); *Marcus v. Search Warrant*, 367 U.S. 717, 730-31 (1961) ("assimilation of obscene literature to gambling paraphernalia and other contraband . . . does not answer the appellants' constitutional claim, but merely restates the issue whether obscenity may be treated the same way"); *Cinema Classics, Ltd. v. Busch*, 414 U.S. 946 (1973), *aff'g* 339 F. Supp. 43, 48-49 (C.D. Cal. 1972) ("Defendants assert that they have the right to retain all of the materials seized regardless of the legality of the warrants or the legality or illegality of the manner in which they were executed. They assert this right of retention on the theory that the materials seized are 'contraband.' This argument must be rejected."); *see also Fort Wayne Books v. Indiana*, 489 U.S. 46, 66-67 (1989) (emphasizing that the government cannot escape these constitutional safeguards through its characterization of the seized materials). The presumption of First Amendment protection for expressive materials cannot be rebutted *until* the "claimed justification for [seizure] . . . is properly established in an adversary proceeding." *Id.* at 67.

Respondents fail to discuss or distinguish these holdings. They also fail to acknowledge the multitude of cases ordering return of expressive material—material that the government generally contended to be "contra-

band *per se*"—as a remedy for First Amendment violations.[4]

Second, Respondents' approach would turn on its head the standard laid down by this Court in *Freedman v. Maryland*, and followed repeatedly in case after case. In *Freedman*, the Court ruled not only that any seizure of expressive materials must be for a brief and specified period, but also that the government must bear the burden of going to court to suppress the speech and bear the burden of proof once in court. 380 U.S. at 58-59. Respondents do not even cite *Freedman*. Instead, they suggest a radical new approach derived from *Carey v. Piphus*, 435 U.S. 247 (1978), a case interpreting the Fourteenth Amendment. Under Respondents' approach, the government would be free to seize expressive material and then do nothing. The *speaker* would then have the burden of going to court and, once in court, proving that the expressive material is *not* "contraband." Merely stating Respondents' position demonstrates what a radical

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[4] *E.g.*, *United States v. Pryba*, 502 F.2d 391, 404 n.97 (D.C. Cir. 1974) (ordering return of First Amendment materials seized without prior adversary hearing); *American News Co. v. Ladas*, 454 F.2d 1237, 1240 (6th Cir. 1972) (same); *Huffman v. United States*, 470 F.2d 386, 392 (D.C. Cir. 1971) (same), *conviction vacated on further appeal*, 502 F.2d 419 (D.C. Cir. 1974); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 298 (2nd Cir. 1970) (same); *United States v. Alexander*, 428 F.2d 1169, 1176 (8th Cir. 1970) (same); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410, 411-12 (2d Cir. 1969) (same); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639, 640-41 (4th Cir. 1969) (same); *Metzger v. Pearcy*, 393 F.2d 202, 203-04 (7th Cir. 1968) (same); *Lee v. City of Rome*, 866 F. Supp. 545, 552 (N.D. Ga. 1994) (same); *Sooner State News Agency, Inc. v. Fallis*, 367 F. Supp. 523, 528-29 (N.D. Okla. 1973) (same); *Platt Amusement Arcade, Inc. v. Joyce*, 316 F. Supp. 298, 299-300 (W.D. Pa. 1970) (same); *City of Duluth v. Wendling*, 237 N.W.2d 79, 82-83 (Minn. 1975) (same); *People v. Superior Court*, 104 Cal. Rptr. 876, 890-91 (Cal. Ct. App. 1972) (same); *Johnson v. City of Rochester*, 197 N.W.2d 244, 247 (Minn. 1972) (same).

departure it would be from this Court's First Amendment jurisprudence. The other cases cited by Respondents (Opp. 12) involve the return of non-expressive contraband, and say nothing about the appropriate remedy for a violation of the First Amendment.

b. Respondents' Failure to Address Freedman.—When Respondents finally get to the merits, they have almost nothing to say. They ignore the First Amendment cases holding the *Freedman* safeguards applicable to all kinds of speech, including political speech, charitable fundraising, news reporting, popular entertainment, and even commercial speech. *See* Pet. 15-16 & nn.8-10, 19 & n.12. In fact, Respondents do not even cite *Freedman* itself. They merely claim that the lower courts were correct in "declining" to "extend" (Opp. 16) the *Freedman* safeguards beyond the context of "obscenity," because obscenity seizures require the exercise of "quite subjective" judgment. Opp. 15. But the standard for obscenity prosecutions ("whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" (Opp. 15)) does not appear any more "subjective" than the standard for counterfeiting prosecutions (whether the items "bear such a likeness or a resemblance to a genuine [bill] . . . as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care supposed to be honest and upright" (Pet. 17 & n.11)). Both standards require interpretation of what the "average" or "reasonable" person would think about the intent or purpose of a picture: the obscenity standard requires judgment about whether the average person would think the picture "appeals to the prurient interest" and the counterfeiting standard requires judgment about whether a reasonable person would think

the picture is "calculated to deceive." (On that question, see the exemplars appended to this Reply Brief.)

Moreover, *Freedman* and its progeny turned on the *opportunity* for unsupervised censorship, not on the *quantum* of judgment the censor must exercise. Even the panel majority conceded that the counterfeiting standard requires the exercise of "some j dgment" (Pet. App. 7a) and Judge Rogers, in dissent, pointed out that it was the questionable "judgment" of the Secret Service and the District Court that a sponge and a bow tie could be "calculated to deceive" as is required by the statute at issue here (Pet. App. 13a).

2. Ex Parte Submission.—Respondents never come to grips with the *ex parte* nature of the proceedings in the District Court. In fact, the words "*ex parte*" do not appear in Respondents' Opposition. Instead of defending the *ex parte* receipt of the core evidence in the case, Respondents pretend that the defects complained of in the Petition were merely that there was argument on paper rather than orally in open court, and that the procedure took place in chambers rather than in open court. But the process afforded did have some other difficulties, which Respondents do not mention, namely that: Boggs did not know which objects the government had submitted to the Judge for his consideration; Boggs did not have copies of the objects or even a list describing them; the Judge did not identify the particular objects that he found to be contraband; Boggs had no opportunity for particularized argument concerning the particular objects; and neither the objects nor any copy or description of them ever made it into the record. Respondents offer no justification for this radical departure from the ordinary judicial process other than to distort the record, misleadingly stating that Boggs "declined" to make the evidence available to the District Court (Opp. 8); the record shows that the evi-

dence has been under lock and key in the vault of the Secret Service since 1992 (Pet. App. 18a). Respondents fall back on the absurd contention that the burden was on the plaintiff, through a motion for reconsideration after the court had entered a judgment infected by these irregularities. But the right to appellate review has never depended on making a motion to reopen a final judgment.

3. Failure to Review the Record.—Compounding the procedural anomalies at the district court, the Court of Appeals simply refused to look at the core evidence in this dispute. This behavior drastically departed from established judicial conduct and the rule of other circuits. *See* Pet. 24-26. Respondents' excuse (Opp. 19-20)—that Petitioner waived its right to seek appellate review on the merits of the confiscation—has never been invoked by a Court of Appeals in any case (let alone a First Amendment case) to abdicate its responsibiilty to conduct actual appellate review. As explained in the Petition, the Court of Appeals had a duty under *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964), "to make an independent examination of the whole record" in cases that implicate First Amendment issues. Respondents do not address or even cite *Sullivan*.[5]

* * * *

[5] Respondents' assertion that Petitioner opposed the Government's offer to present the bills to the Court of Appeals (Opp. 20) is simply a missatement of the proceedings below. Point I of Boggs' Brief cited this Court's opinion in *Sullivan* for the proposition that the Court of Appeals has an independent duty to review the whole record, and expressly requested a remand for the purpose of, at minimum, supplementation of the record. When Respondents proposed in their brief for Appellees that they could make a further *ex parte* submission to the appeals court, Petitioner noted that further proceedings *dehors* the record would be improper. And at oral argument, when the Respondents appeared with their "trove of confiscated art" (Pet. App. 13a), Petitioner expressly requested that the Court of Appeals look at the art and order the record supplemented. Petitioner followed with a written motion, which the court denied.

The prohibition on prior restraints is a matter of broad public interest, and the standards to be followed in forfeiture proceedings govern more than 2,000 cases per year in the federal courts alone. *See Judicial Business of the United States Courts: 1997 Report of the Director* at 132 (Table C-2A). Yet Respondents claim that this case is "unrelated to any generalized issue of national importance." Opp. 19. Perhaps this means that while there are many producers (artists and others) of erotic material, Boggs appears to be the only artist producing works of art that satirize and spoof money and that bear a resemblance to the currency—or at least the only one that the Treasury has gone after. Or perhaps it means that the procedural irregularities in this case were so bizarre that no other court will follow this case as a precedent.

Neither of those two notions detracts from the importance of granting certiorari here. Just as producers of erotic material charged with producing "obscenity" are entitled to a hearing to determine whether their material is within the constitutional bounds of what can be suppressed as being "obscenity," an artist producing works of art that bear a resemblance to the currency is entitled to a hearing as to whether his work can be suppressed under the counterfeiting statute, to the extent that it may be constitutionally applied. There was no hearing given Boggs either prior to or after the seizure of his works. The exemplars of his work chosen by the government for submission to the District Court were not identified to Boggs or his counsel; no government brief analyzing them one by one and arguing for their constitutional coverage by the statute was submitted, and Boggs had no opportunity to submit a contrary brief prior to decision; the Court's action was *ex parte*, without supporting findings, without any analysis work by work, and the exemplars examined by the Court in chambers were not

even put in the record. The grant of summary judgment to the Treasury under these circumstances was a travesty.

That departures so wide from the Federal Rules of Civil Procedure and the fundamental requirements of procedural due process are blessedly rare does not detract from the importance of this case, involving not only an extraordinary departure from procedural regularity but also the important question of the applicability of the rule announced in *Freedman* and applied uniformly in the intervening years. Moreover, the government's assertion (Opp. 10-11 n.5) that even if the works were *not* contraband, the doctrine of "sovereign immunity" precludes the courts from ordering their return, notwithstanding the First Amendment's protection of free speech and the Fifth Amendment's protection of private property, is so odious as to suggest that this case be taken to extirpate that notion, as well as to teach the proper scope of the *Freedman* case and to correct the gross departures from procedural due process sanctioned below.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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